

**Letter of Findings Number: 04-20130532  
Sales and Use Tax  
For Tax Years 2010-12**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

**ISSUE**

**I. Use Tax--Exemptions.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-3; IC § 6-2.5-5-45.8; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-5-10](#).

Taxpayer protests assessment of use tax.

**STATEMENT OF FACTS**

Taxpayer is an Indiana service company operating as an onsite treatment plant. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid proper amounts of Indiana sales tax for the tax years 2010-2012. This underpayment resulted in a proposed assessment of Indiana use tax. Taxpayer is protesting the imposition of use tax resulting from the proposed assessment findings. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Use Tax--Exemptions.**

**DISCUSSION**

Taxpayer protests proposed assessments of use tax for the 2010-2012 tax years. Taxpayer claims certain items used in the business are exempt under either the recycling exemption or industrial processing exemption found in the Indiana code. The Department concluded that Taxpayer was providing a service since the Taxpayer did not meet the criteria required for either a recycler or an industrial processor. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction, or if there is an applicable exemption to sales and use taxes.

Taxpayer's first position concerns the industrial processing exemption. The exemption is found at IC § 6-2.5-5-3(b), which states:

Except as provided in subsection (c), transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

Next, the Department refers to [45 IAC 2.2-5-10\(a\)](#), which states in relevant part:

An industrial processor, as defined in [IC 6-2.5-4-2](#), is one who:

- (1) acquires tangible personal property owned by another person;
  - (2) provides industrial processing or servicing, including enameling or plating, on the property; and
  - (3) transfers the property back to the owner to be sold by that owner either in the same form or as a part of other tangible personal property produced by that owner in his business of manufacturing, assembling, constructing, refining, or processing.
- (Emphasis added).

Since the Taxpayer must meet all the elements listed, the third requirement is vital to qualifying for the exemption. Here, the facts provide that Taxpayer's customer merely uses the cleaned tangible personal property as fuel for its manufacturing process. This type of use cannot be said to give rise to a sale of the property received from Taxpayer, thus the industrial processor exemption is not applicable to Taxpayer, as provided by [45 IAC 2.2-5-10\(a\)\(3\)](#). Therefore, Taxpayer's operations do not qualify for the industrial processor exemption.

Taxpayer's second position is that it qualifies for the recycling exemption found at IC § 6-2.5-5-45.8 (which was only effective beginning on January 1, 2012, and therefore inapplicable to the first two years under protest) which states:

- (a) For purposes of this section, [IC 6-2.5-4-5](#), and section 30 of this chapter, the following definitions apply:
  - (1) "Recycling" means the processing of recycling materials and other tangible personal property into a product for sale if the product is predominantly composed of recycling materials. The term does not include the following:
    - (A) The demolition of improvements to real estate.
    - (B) The processing of tangible personal property primarily for disposal in a licensed solid waste disposal facility rather than for sale.
    - (C) The collection of recycling materials by licensed motor vehicles.
  - (2) "Recycling materials" means tangible personal property, including metal, paper, glass, plastic, textile, or rubber, that:
    - (A) is considered "scrap" by industry standards or has no more than scrap value;
    - (B) is a byproduct of another person's manufacturing or production process;
    - (C) was previously manufactured or incorporated into a product;
    - (D) would otherwise reasonably be expected to be destined for disposal in a licensed solid waste disposal facility; or
    - (E) has been removed or diverted from the solid waste stream for sale, use, or reuse as raw materials, regardless of whether or not the materials require subsequent processing or separation from each other.
  - (3) "Processing of recycling materials" means:
    - (A) the activities involved in collecting or otherwise receiving recycling materials and other tangible personal property; and
    - (B) creating a product for sale by changing the original form, use, or composition of the property (whether manually, mechanically, chemically, or otherwise) through weighing, sorting, grading, separating, shredding, crushing, compacting, breaking, cutting, baling, shearing, torching, wire-stripping, or other means.
- (b) Transactions involving machinery, tools, and equipment are exempt from the state gross retail tax if:
  - (1) the person acquiring that property acquires it for direct use in the direct processing of recycling materials; and
  - (2) the person acquiring that property is occupationally engaged in recycling.
- (c) Transactions involving recycling materials and other tangible personal property to be consumed in the processing of recycling materials or to become a part of the product produced by the processing of recycling materials are exempt from the state gross retail tax if:
  - (1) the person acquiring that property acquires it for direct use in the direct processing of recycling

materials; and  
(2) the person acquiring that property is occupationally engaged in recycling.  
(Emphasis added).

Therefore, a recycler must produce a new product for sale from recycling materials. After review of the documentation submitted in support of its protest, the Department is unable to agree that Taxpayer is producing a new product for sale. As provided by IC § 6-2.5-5-45.8(3)(B), requires that a recycler create a product for sale. The pricing agreements between Taxpayer and its customers refer to purchases of services to tangible personal property, not to the sale of tangible personal property. Therefore, Taxpayer's activities do not meet the requirements of IC § 6-2.5-5-45.8 in order to be considered a recycler. In conclusion, Taxpayer does not qualify for either the industrial processing exemption found at IC § 6-2.5-5-3(b) or for the recycling exemption found at IC § 6-2.5-5-45.8. Also, the recycling exemption was not available for the first two years of the audit period, therefore any purchases in those two years would not be exempt under IC § 6-2.5-5-45.8 in any case.

### **FINDING**

Taxpayer's protest is denied.

*Posted: 07/30/2014 by Legislative Services Agency*  
An [html](#) version of this document.